FILED
AUG 18 2016
OFFICE OF THE CLERK

No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SW GENERAL, INC., D/B/A SOUTHWEST AMBULANCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 56 national and international labor organizations with a total membership of 12.5 million working men and women.[1] This case concerns the extent of the President's authority to direct a high-level career employee of the National Labor Relations Board to temporarily perform the functions of the NLRB General Counsel when that position becomes vacant. The NLRB General Counsel plays a crucial role in the enforcement of the National Labor Relations Act. The AFL-CIO, and its affiliates, have a vital interest in the effective enforcement of the NLRA.

SUMMARY OF ARGUMENT

Except where some other statute expressly provides an alternative means, Section 3345 of the Federal Vacancies Reform Act (FVRA) provides the exclusive means for temporarily authorizing a federal official to perform the functions and duties of a vacant Executive office that can be permanently filled only by a Presidential appointment with the consent

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[1] Counsel for the petitioner and counsel for the respondent have consented to the filing of this *amicus* brief in letters that have been filed with the clerk. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

of the Senate. Subsection (a)(1) of the FVRA provides that the first assistant to the office will automatically assume the functions and duties on a temporary basis when the permanent office-holder vacates the office or is otherwise unable to perform.

Subsections (a)(2), (a)(3) and (c)(1) each provides an alternative method for the President to fill a vacancy on a temporary basis. Subsection (a)(2) allows the President to designate someone who holds a different Senate-confirmed appointment. Subsection (a)(3) allows the President to designate a high-ranking long-term employee from within the agency. Subsection (c)(1) allows the President to designate an office-holder whose term has expired but who has been nominated for reappointment. To indicate that these methods are alternatives to the automatic appointment provided for in subsection (a)(1), each of these subsections begins with the phrase "[n]otwithstanding subsection (a)(1)" or the equivalent phrase "notwithstanding paragraph (1)."

Subsection (b)(1) provides another exception to the automatic appointment provided for in subsection (a)(1). This subsection provides, as general matter, that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if "the President submits a nomination of such person to the Senate for appointment to such office." As with the other subsections, the phrase "[n]otwithstanding subsection (a)(1)" in subsection (b)(1) indicates that the limitation on temporary appointments stated there affects only appointments made pursuant to subsection (a)(1).

The court below recognized that the term "notwith-

standing" means "in spite of," "in derogation of," or "superseding." But the court refused to accord this meaning to the phrase "notwithstanding subsection (a)(1)" as it was used in subsection (b)(1). Indeed, the court accorded no significance whatsoever to the phrase. Instead, the court of appeals focused on various other phrases in the FVRA, which the court thought indicated a broad application of subsection (b)(1). The court's textual analysis of these various phrases does not withstand scrutiny.

ARGUMENT

Section 3345(a)(1) of the Federal Vacancies Reform Act (FVRA) provides that when an officer of an Executive agency becomes unable to perform the functions and duties of his or her office "the first assistant to the office of such officer shall perform the functions and duties temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). Subsections (a)(2), (a)(3), and (c)(1) provide three alternative methods by which the President can temporarily fill such a vacancy "notwithstanding subsection (a)(1)." 5 U.S.C. §§ 3345(a)(2) (designating someone who holds a different Senate-confirmed appointment), 3345(a)(3) (designating a high ranking long-term employee from within the agency) & 3345(c)(1) (designating a person who has been nominated for reappointment to the office but whose term has expired).

Subsection (b)(1) provides that "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer under this section" if the person has been nominated by the President for appointment to the office and has not "served in the position of first assistant to the office of such officer" for at least 90 days

during the 365 days preceding the occurrence of the vacancy. 5 U.S.C. § 3345(b)(1). In the two decades since enactment of the FVRA, Presidents Clinton, Bush and Obama each frequently acted on the understanding that subsection (b)(1) applies only to acting officers temporarily filling a vacancy pursuant to subsection (a)(1). *See* Cert. Pet. 4-7. The Senate, having been fully informed of those Presidential actions, consistently acquiesced in the Presidents' interpretation of the FVRA. *Ibid.* Very recently, however, the D.C. and Ninth Circuits have rejected that long-standing interpretation and held that subsection (b)(1) applies to acting officers temporarily filling vacancies pursuant to any of the methods provided by FVRA § 3345.

The decision below – and the Ninth Circuit decision following it – rests entirely on a close textual analysis of FVRA § 3345. That textual analysis does not withstand scrutiny. Rather, as we now show, the interpretation of the FVRA by the elected branches with direct responsibility for appointing and confirming Executive officers – i.e., the President and the Senate – is the interpretation dictated by the statutory text.

A. The core of FVRA § 3345 is subsection (a)(1). Subsection (a)(1) provides that whenever "an officer of an Executive agency," whose appointment to office was made by the President with the advice and consent of the Senate, "dies, resigns or is otherwise unable to perform the functions and duties of the office[,] the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." In other words, subsection (a)(1) provides that the normal course

whenever a vacancy occurs in such an Executive office is that "the first assistant to the office" automatically will be charged with "perform[ing] the functions and duties of the office temporarily."[2]

The remaining subsections of FVRA § 3345 – i.e., subsections (a)(2), (a)(3), (b)(1), and (c)(1) – state a variety of exceptions to the normal course of temporary succession provided by subsection (a)(1). Each of those subsections begins with the phrase "[n]otwithstanding subsection (a)(1)" or the equivalent phrase "notwithstanding paragraph (1)." Each time the phrase appears, it serves to indicate an exception to subsection (a)(1) and only to subsection (a)(1).

1. Subsections (a)(2), (a)(3), and (c)(1) each provide that the President "may direct" someone other than the "first assistant to the office" to temporarily perform the functions and duties of the vacant Executive office. Subsection (a)(2) provides that "the President . . . may direct a person who serves in an office for which appointment is required to be made by the President by and with the advice and consent of the Senate, to perform the functions and duties of the va-

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[2] It bears emphasis that "the first assistant to the office" authorized to "perform the functions and duties of the office temporarily" pursuant to subsection (a)(1) can be a person appointed to the first assistant position after the office-holder becomes unable to perform the functions of the office. This is pertinent to understanding the later reference in subsection (b)(1)(A)(i) to a person who "during the 365-day period preceding" the vacancy "did not serve in the position of the first assistant to the office." As we discuss later in point D, this created some confusion in the court below.

cant office." Subsection (a)(3) provides that "the President . . . may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office," provided that the officer or employee held a high level position in the agency for at least 90 days "during the 365-day period preceding the date of the [vacancy]." And, subsection (c)(1) provides that "the President . . . may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive Department . . . without a break in service, to continue to serve in that office subject to the same time limitations" that apply to all temporary successions provided for by FVRA § 3345.

A temporary assignment made by the President using one of the three methods provided for in subsections (a)(2), (a)(3) and (c)(1) displaces the automatic succession provided for in subsection (a)(1). To make the displacement clear, each of these subsections begins by stating that its method of appointment applies "notwithstanding" the method of appointment provided for by subsection (a)(1). In each subsection, the "notwithstanding" phrase indicates that, where applicable, the provisions of the subsection in question supersede the provisions of subsection (a)(1).

2. Subsection (b)(1) provides a fourth exception to subsection (a)(1), this one limiting the service of a first assistant. Subsection (b)(1) states that, "[n]otwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section" if "the President submits a nomination of such person to the Senate for appointment to such of-

fice." Subsection (b)(1) further states that this general prohibition does not apply where the person has "served in the position of first assistant to the office of such officer" for at least 90 days "during the 365-day period preceding the date of the [vacancy]." Subsection (b)(2) provides an exception to the prohibition where the first assistant position required appointment by the President and confirmation by the Senate and the person has met those requirements.

Just like subsections (a)(2), (a)(3) and (c)(1), subsection (b)(1) supersedes the appointment process provided by subsection (a)(1). And, just like subsections (a)(2), (a)(3) and (c)(1), subsection (b)(1) begins with the phrase "[n]otwithstanding subsection (a)(1)" to indicate that the exception stated therein supersedes only subsection (a)(1) and not the various alternative appointment processes provided for by the other subsections.

If subsection (b)(1) were intended to place a limitation on the appointment processes other than the one started in subsection (a)(1), it would not have begun with the phrase "[n]otwithstanding subsection (a)(1)." Without that qualifying phrase, subsection (b)(1) could be read as stating a categorical prohibition on any person serving as an acting officer pursuant to FVRA § 3345 once the person has been nominated for appointment to the office.[3] But sub-

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[3] A categorical prohibition on someone temporarily filling a vacancy once he or she has been nominated would nullify subsection (c)(1), which allows the President to direct a person who has been nominated for reappointment to continue to serve on a temporary basis following the expiration of his or her term. We will return to this point later in point C.

section (b)(1) does begin with the limitation "Notwithstanding subsection (a)(1)," and the only way the subsection can be read to state a categorical prohibition is by ignoring the limitation with which it begins.

The D.C. Circuit correctly observes that the phrase "notwithstanding subsection (a)(1)" can be read to mean "in spite of subsection (a)(1)," "in derogation of subsection (a)(1)," or "superseding subsection (a)(1)." Pet. App. 13a-14a. These are all various ways of saying the same thing – that the provision in question derogates from and supersedes subsection (a)(1). When subsections (a)(2), (a)(3) and (c)(1) begin this way, it clearly means that the alternative appointment method provided for in the particular subsection derogates from or supersedes the usual appointment method provided for in subsection (a)(1). And when subsection (b)(1) begins this way, it just as clearly means that the limitations on a first assistant temporarily filling an Executive office stated therein supersede the first assistant's assignment pursuant to subsection (a)(1).

3. The D.C. Circuit's principal ground for disregarding the phrase "[n]otwithstanding subsection (a)(1)" is that "[t]he first independent clause of subsection (b)(1) . . . states that '*a person* may not serve as an acting officer for an office under *this section*.'" Pet. App. 12a (court's emphasis). But the court's analysis of that clause does not stand up to scrutiny.

The court of appeals found it especially significant that the clause uses the word "person," rather than the term "first assistant," because "[t]he term 'a person' is broad; it covers the full spectrum of possible candidates for acting officer." Pet. App. 12a. In context,

however, it is apparent that Congress used the term "person," because subsection (b)(1) refers to an individual both in his or her capacity as a first assistant temporarily filling an office and in his or her capacity as a nominee to permanently fill the same office. The core of subsection (b)(1) is the prohibition that "a *person* may not serve as an acting officer for an office under this section if . . . the President submits a nomination of *such person* to the Senate for appointment to such office." A reference to the President submitting "a nomination of such first assistant" would be confusing, and perhaps nonsensical. Hence the use of the term "person," which allows reference to the person in both of their capacities – as an acting officer and as a nominee.

The court of appeals also found it significant that the clause refers to "serv[ing] as an acting officer *under this section*," while other provisions in the FVRA are "precise in [their] use of internal cross-references." Pet. App. 12a (court's emphasis). Ironically, most of the "precise . . . internal cross-references" cited by the court below are the "[n]otwithstanding subsection (a)(1)" clauses that the court treats as completely insignificant. Subsection (b)(1) refers to persons "serv[ing] as an acting officer under this section" to indicate that it does not apply to persons who are serving under another "statutory provision [that] expressly" provides other means to "designate[] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1).

B. The exceptions to subsection (b)(1)'s prohibition on any person temporarily performing the func-

tions of an office to which he or she has been nominated provide additional strong indication that the subsection applies only to persons serving pursuant to subsection (a)(1). Both of the exceptions apply only to a person who is temporarily acting pursuant to his or her status as a first assistant. The first exception allows someone who served as a first assistant for at least 90 days during the 365 day period preceding the date of the vacancy to temporarily perform the functions of an office he or she has been nominated to fill. 5 U.S.C. § 3345(b)(1)(A). The second exception allows a first assistant whose appointment required nomination by the President and confirmation by the Senate to temporarily perform the functions of the office he or she has been nominated to fill. 5 U.S.C. § 3345(b)(2). Thus, both of the exceptions apply only to persons who are serving temporarily by virtue of having been the first assistant to the office in question. In other words, both exceptions apply only to persons who are temporarily performing the functions of a vacant office pursuant to subsection (a)(1).

It is also significant that each of the two exceptions to the general prohibition in subsection (b)(1) add qualifications that are parallel to qualifications required for temporary appointments under subsections (a)(2), (a)(3) and (c)(1). The first (b)(1) exception allows a first assistant to temporarily perform, pursuant to subsection (a)(1), the functions of an office to which he or she has been nominated if he or she held the position of first assistant for at least 90 days during the 365-day period preceding the date of the vacancy. This parallels the 90 day service requirement for persons appointed to temporarily perform the

functions of a vacant office pursuant to subsection (a)(3). The second (b)(1) exception allows a first assistant who has been appointed to that position by the President and confirmed by the Senate to temporarily perform the functions of the vacant office pursuant to subsection (a)(1). This parallels the requirements of subsections (a)(2) and (c)(1), which allow the President to appoint someone who has been confirmed by the Senate for the position at issue or for another office to serve temporarily.

In sum, the logic of subsection (b) is that a first assistant can continue to temporarily perform the functions of an office he or she has been nominated to fill only if the person served as the first assistant for 90 days during the 365-day period preceding the date of the vacancy or was appointed to the first assistant position by the President and confirmed by the Senate. In other words, while the normal course is for the first assistant to temporarily perform the functions of the vacant office pursuant to subsection (a)(1), if the President nominates the first assistant to fill the office, the nominee can continue to temporarily perform those functions only if he or she meets the sort of conditions that are required for temporary assignment under one of the other subsections.

The obvious purpose of subsection (b)(1) is to prevent the President from immediately installing a nominee for an office requiring Senate confirmation, who is neither a high-ranking career employee of the agency nor already a Senate-confirmed appointee, through the device of simultaneously submitting the nomination and appointing the nominee to be first assistant to the office. There is nothing to indicate that

subsection (b)(1) was intended to prevent the President from, as occurred here, directing a high-ranking career employee (or a Senate-confirmed officeholder) to temporarily perform the functions of a vacant office and then nominating that employee to permanently fill the office.

C. Reading subsection (b)(1) to apply to temporary appointments made pursuant to subsections other than (a)(1) brings subsection (b)(1) into conflict with subsection (c)(1). Subsection (c)(1) provides that "the President . . . may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive Department . . . without a break in service, to continue to serve in that office subject to the same time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die." However, subsection (b)(1) states that "a person may not serve as an acting officer for an office under this section, if . . . the President submits a nomination of such person to the Senate for appointment to such office." Thus, subsection (b)(1), were it applicable, would expressly prohibit what subsection (c)(1) expressly permits.

A person directed to continue in office pursuant to subsection (c)(1) clearly "serve[s] as an acting officer" within the meaning of FVRA § 3345. In the first place, "the expiration of a term of office" – the situation addressed by subsection (c)(1) – is expressly treated as "an inability to perform the functions and duties of such office." 5 U.S.C. § 3345(c)(2). And, the title to FVRA § 3345 indicates anyone temporarily performing the duties and functions of an office under that

section – including pursuant to subsection (c)(1) – is an "acting officer." What is more, the "time limitations in section 3346," which apply to all temporary appointments under section 3345, including temporary appointments pursuant to subsection (c)(1), apply to any "person serving as an *acting officer* as described under section 3345." 5 U.S.C. § 3346(a) (emphasis added).

The two exceptions to subsection (b)(1) do not serve to harmonize that provision with subsection (c)(1). Someone who actually held the office in question would almost certainly not have been the first assistant to that office for any substantial period of time during the 365 day period preceding the expiration of his or her term. And, by definition, a person directed to continue performing the functions of an office pursuant to subsection (c)(1), while his or her nomination for reappointment is pending, does not meet the second exception to (b)(1) of serving as a Senate-confirmed first assistant to that office. Thus, a person directed to temporarily serve pursuant to subsection (c)(1) could not satisfy either of the exceptions to subsection (b)(1).

The only way to avoid bringing subsection (b)(1) into direct conflict with subsection (c)(1) is to give effect to the phrase "[n]otwithstanding subsection (a)(1)" by construing subsection (b)(1) to apply only to persons serving as acting officers pursuant to subsection (a)(1).

D. Neither of the textual objections raised by the circuit courts to reading subsection (b)(1) as applying only to temporary service pursuant to subsection (a)(1) withstands scrutiny.

The first textual objection is that if subsection (b)(1) applies only to temporary service pursuant to subsection (a)(1), then the reference in subsection (b)(1)(A)(i) to "serv[ice] in the position of first assistant to the office of an officer described under subsection (a) . . . during the 365 day period preceding the date of the [vacancy]" is redundant, since all persons serving pursuant to subsection (a)(1) will have met this requirement. Pet. App. 16a. However, as the court below recognized, this provision is redundant only if subsection (a)(1) applies only to persons who are incumbent first assistants on the date the vacancy first occurs. *Ibid.* In fact, subsection (a)(1) is not limited to first assistants holding that position on the date the vacancy occurs. By its terms, subsection (a)(1) would allow a first assistant appointed after the date of the vacancy – i.e., a first assistant who had not held that position "during the 365 day period preceding the date of the [vacancy]" – to temporarily perform the duties and functions of the vacant office.

The second textual objection is that reading subsection (b)(1) to apply only to temporary service pursuant to subsection (a)(1) would make redundant subsection (b)(2)(A)'s requirement of "servi[ce] as the first assistant to the office of an officer described under subsection (a)." Pet. App. 16a. But subsection (b)(2)(A) does not stand alone and thus does not state a separate requirement. Rather, subsection (b)(2)(A) states one part of a single three-part requirement: (A) that the person serve as the first assistant, (B) that the first assistant position so held require Presidential appointment and Senate confirmation, and (C) that the person in question was actually appointed to the first assistant position and confirmed by the Senate. This

three-part requirement could have been written as a single sentence without the lettered subdivisions: "such person is serving as the first assistant having met the requirements of being appointed to that position by the President and confirmed by the Senate." Limiting subsection (b)(1) to persons serving pursuant to subsection (a)(1) does not make this three-part requirement redundant.

* * *

The President and the Senate have – over the two decades since the enactment of the Federal Vacancies Reform Act – correctly proceeded on the understanding that subsection (b)(1) applies only to acting officers serving pursuant to subsection (a)(1).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration on the merits.

Respectfully submitted,

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